No. 09-524

Supreme Court, U.S.
FILED

In The

Supreme Court of the United States

NITRO DISTRIBUTING, INC., et al.,

Petitioners,

v.

ALTICOR INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

JAMES R. SOBIERAJ
Counsel of Record
CYNTHIA A. HOMAN
RALPH J. GABRIC
JULIE L. LEICHTMAN
BRINKS HOFER GILSON & LIONE
NBC Tower – Suite 3600
455 North Cityfront Plaza Drive
Chicago, Illinois 60611
(312) 321-4200

December 2, 2009

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether summary judgment is properly granted under *Matsushita* when, as here, an antitrust claimant lacks both: (a) direct evidence of an accused's participation in an alleged antitrust conspiracy, and (b) circumstantial evidence of an accused's participation in an alleged antitrust conspiracy tending to exclude the possibility that the accused acted independently, a question as to which the courts of appeals are not in conflict.

2. Whether summary judgment is properly granted when, as here, an antitrust claimant asserting solely *per se* violations did not come forward with evidence raising a genuine dispute regarding whether the accused operated at the same level of the market as its alleged co-conspirators.

LIST OF PARTIES

The petitioners are: Nitro Distributing, Inc.; West Palm Convention Services, Inc.; Netco, Inc.; Schmitz & Associates, Inc.; and U-Can-II, Inc.

Until September 2008, the respondents were: Alticor Inc.; Amway Corporation; and Quixtar Inc. On September 1, 2008, respondent Amway Corporation became known as Amway International Inc., and respondent Quixtar Inc. became known as Amway Corp.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Solstice Holdings Inc. is the parent company of respondent Alticor Inc. and owns 100 percent of its stock. No publicly held corporation owns 10 percent or more of Alticor Inc.'s stock.

Respondent Alticor Inc. is the parent company of respondent Amway International Inc., which before September 1, 2008 was known as Amway Corporation. No publicly held corporation owns 10 percent or more of Amway International Inc.'s stock.

Alticor Corporate Enterprises Inc. is the parent company of respondent Amway Corp., which before September 1, 2008 was known as Quixtar Inc. Alticor Corporate Enterprises owns 100 percent of Amway Corp.'s stock. No publicly held corporation owns 10 percent or more of Amway Corp.'s stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	9
I. THE EIGHTH CIRCUIT CORRECTLY APPLIED THE WELL-SETTLED *MATSUSHITA* STANDARD	10
A. The Circuits Are Not In Conflict Over The *Matsushita* Standard	10
B. Petitioners Admitted In The District Court That They Have No Direct Evidence Of Conspiracy; Thus, Their Unpreserved Argument Seeks An Advisory Opinion On A Non-Existent Set Of Facts	13
C. Petitioners Did Not Offer Any Evidence Tending To Exclude The Possibility That Amway Acted Independently, As *Matsushita* Required Them To Do	15
II. THE EIGHTH CIRCUIT CORRECTLY RULED THAT AMWAY DOES NOT COMPETE AT THE SAME LEVEL OF THE MARKET AS InterNET AND PRO NET	16

TABLE OF CONTENTS – Continued

Page

III. THE COURT OF APPEALS ALSO AFFIRMED ON GROUNDS PETITIONERS DO NOT CHALLENGE HERE, AND THUS THIS COURT'S DISPOSITION OF THE QUESTIONS PRESENTED WOULD NOT ALTER THE RESULT BELOW 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES — Page

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 10, 11

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc., 203 F.3d 1028 (8th Cir. 2000) 12

Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073 (10th Cir. 2006) 12, 13

Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761 (8th Cir. 2004) 12

ES Dev., Inc. v. RWM Enters., Inc., 939 F.2d 547 (8th Cir. 1991) 17

Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11 (1st Cir. 2004) 12

In re Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999) 14

Lovett v. Gen. Motors Corp., 998 F.2d 575 (8th Cir. 1993) 12

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) ....*passim*

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) 10

Rogers v. United States, 522 U.S. 252 (1998) 14, 17

Rossi v. Standard Roofing, Inc., 156 F.3d 452 (3d Cir. 1998) 13

Scott v. Harris, 550 U.S. 372 (2007) 8

TABLE OF AUTHORITIES – Continued

CASES Page

United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) 17

Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256 (2d Cir. 2001) 12

Youakim v. Miller, 425 U.S. 231 (1976) 15

No. 09-524

In The Supreme Court of the United States

NITRO DISTRIBUTING, INC., et al.,

Petitioners,

v.

ALTICOR INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

INTRODUCTION

The case-specific holding of the Eighth Circuit is correct and does not warrant this Court's review. Petitioners attempt to create an inter-circuit conflict regarding the *Matsushita* standard, when none exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

The Eighth Circuit concluded that, regardless of whether petitioners' alleged evidence could be characterized as direct or circumstantial, there was no genuine issue requiring trial. It did not hold that petitioners had any direct evidence of Amway's

alleged participation in an antitrust conspiracy. Rightly so, for petitioners had none, nor did they argue to the district court that they had presented any. In fact, petitioners conceded while opposing summary judgment that their case was entirely circumstantial. Petitioners only recently switched gears at the Eighth Circuit, arguing for the first time that they had presented direct evidence and that *Matsushita* should not apply. Their belated arguments are unpreserved and meritless.

Petitioners' assertion that the Court of Appeals somehow created a *de minimis* market share exception to *per se* antitrust liability is similarly based on a distortion of the Eighth Circuit's opinion and unfounded assumptions regarding what their evidence was capable of showing.

Neither a circuit conflict, confusion, nor any question of constitutional significance is raised here. Petitioners' real quarrel is with the Eighth Circuit's view of the record. Petitioners fault the Court of Appeals for not accepting their unsupported characterizations of the evidence, even when such characterizations flew in the face of their other unambiguous admissions of record. Their disagreements with the Court of Appeals over the significance of the undisputed record evidence are case-specific and will have little, if any, impact on future cases.

Nor would review of the issues presented by petitioners change the outcome in this case. Other legal impediments and unchallenged deficiencies in

their proofs, (*see, e.g.*, Pet. 8),[1] would preclude a different outcome in the courts below. The petition should be denied.

COUNTERSTATEMENT OF THE CASE

Background

1. Petitioners participated in the business support material ("BSM") market. BSMs include motivational materials or "tools," such as tapes and books, as well as "functions," such as live seminars. Petitioners produced BSMs related to the Amway business, which are intended to educate distributors of Amway products in best practices in selling and marketing.

2. Respondents (collectively, "Amway") manufacture a wide variety of personal and home care products that are sold through a vertically integrated network of distributors. (App. 69, 77-78.)

Amway products distributors sell, and sponsor others to sell, Amway products. When a distributor sponsors someone who, in turn, sponsors another, they are positioned vertically relative to each other in a "line of sponsorship" (or "LOS"). (App. 69, 77-78.)

[1] Page number references to the petition, "Pet. ___" refer to the pagination in the 8.5-by-11 inch, unredacted version under seal.

Amway products distributors agree to abide by Amway's Rules of Conduct. Amway does not require its distributors to use or to purchase BSMs. Amway's Rules of Conduct prohibit incorporated products distributors from selling anything other than authorized Amway products. If a distributor wishes to sell or distribute BSMs, he or she ordinarily will form a separate BSM corporation. (App. 69, 77-78.)

Petitioners are BSM corporations formed by principals of Amway products distributorships. These principals and their Amway products distributorships are not parties here. (App. 70, 72.)

Amway's Rules of Conduct also prohibit its products distributors from soliciting those whom they did not sponsor into the products business to purchase non-Amway products, including BSMs. (App. 15.)

2. Petitioners' claims against Amway arose out of a series of disagreements with their associates in the BSM business. Petitioners sued these associates in separate actions.

As early as 1996, several principals of BSM corporations, including Ken Stewart, owner of petitioners Nitro and West Palm, sought to break away from their existing BSM distribution network – InterNET – and form a new network – Pro Net. (App. 3-4.)

In the past, such splits had been acrimonious. Because all of these individuals also owned

separately incorporated Amway products distribution businesses, the acrimony tended to disrupt Amway's distribution network. (App. 4-5, 12.) For this reason, Amway had an obvious interest in ensuring that the InterNET-Pro Net dispute did not disrupt the Amway products distribution network.

District Court Proceedings

3. Amway filed four motions for summary judgment, asking the district court to dismiss all of petitioners' federal and state claims. Petitioners admitted repeatedly that they lacked direct evidence to support their claims against Amway, and that their case rested entirely upon circumstantial evidence. Petitioners' alleged evidence of Amway's involvement in the InterNET-Pro Net split is summarized accurately in the opinions of the Eighth Circuit and the district court. (*See* App. 4-7, 40-45.)

4. During summary judgment arguments, petitioners unequivocally stated that "'we don't have direct evidence exactly what they [Respondents] did but they [Respondents] were there, Judge.'" (App. 50.)[2]

---

[2] Petitioners inundated the district court with an over 800-paragraph "Master Statement of Facts," (App. 38), exclusive of their briefs. Petitioners' factual assertions frequently lacked any direct citation to the record evidence. Indeed, as the district court observed, the rambling submission "appears to reflect the difficulty even Plaintiffs have had in trying to set forth sufficient facts to support the conspiracy theory which is the heart of this case." (App. 38.)

Quoting extensively from petitioners' representations at oral argument, the district court granted Amway's motions for summary judgment.

The district court concluded that petitioners' circumstantial evidence did not tend to exclude the possibility that Amway acted independently, and failed to show any meeting of the minds between Amway and its alleged co-conspirators. (App. 48-53.) The district court specifically observed, "[t]his case is all about inference as there has been no direct evidence proffered to establish the existence of a conspiracy." (App. 50.) The district court also dismissed the antitrust claims of petitioners Netco, Inc. ("Netco") and Schmitz & Associates, Inc. ("Schmitz & Associates") as barred by the statute of limitations. (App. 65-66.)

Eighth Circuit Proceedings

5. Not until they got to the Eighth Circuit did petitioners argue that they had any direct evidence. And even then, petitioners relied primarily upon attorney argument that had absolutely no support in the record.[3]

---

[3] In asserting on appeal that the district court had misunderstood the nature of their conspiracy allegations and overlooked genuine factual disputes, petitioners frequently referred the Eighth Circuit to their briefs and Master Statement of Facts, rather than to any underlying evidence. (App. 17 at n.5.)

In a unanimous opinion, the Eighth Circuit affirmed the district court's dismissal of petitioners' antitrust claims for at least four reasons unique to this case:

First, petitioners' evidence did not tend to exclude independent action by Amway. (App. 9-12.)

Second, the undisputed evidence of record showed that because Amway did not compete at the same level of the market as InterNET and Pro Net, petitioners failed to raise a triable issue regarding any *per se* violation of the antitrust laws. (App. 12-14.)

Third, there was no evidence that the InterNET-Pro Net breakaway was unlawful. (App. 14-17.)

Fourth, the antitrust claims of petitioners Netco and Schmitz & Associates were time-barred. (App. 18-19.)

Petitioners only seek this Court's review of the Eighth Circuit's first two reasons for affirming the dismissal of their antitrust claims. Petitioners assume at the outset, contrary to the Eighth Circuit's express reasoning, that they had proven timely, *per se* violations of the antitrust laws.[4] (Pet. 4.) However,

---

[4] This unproven assumption has been the centerpiece of petitioners' case and drew criticism from both the district court and the Eighth Circuit. (App. 13 ("Once again, appellants' theories are cognizable only if a conspiracy is assumed."); App. 50 ("Plaintiffs are not allowed to make their case by first 'assuming a conspiracy and then explaining the evidence accordingly.' ").)

neither the district court nor the Court of Appeals held that the alleged agreement between InterNET and Pro Net constituted a *per se* illegal customer allocation agreement, nor have the petitioners proven as much.[5] The Eighth Circuit correctly recognized that the arrangement between InterNET and Pro Net could not be presumed to be *per se* illegal:

> The Court: You keep saying in the briefs, over and over, "it's per se, it's per se." It doesn't look that way to me.
>
> Mr. Boulware: Well, it's – it's – a –
>
> The Court: I mean it's a covenant not to compete of sorts. That's another, that's another way you can describe it. But covenants not to compete are not per se

---

[5] In this Court, petitioners fault Amway, as they did in the courts below, for failing to controvert each and every one of their 828 assertions in their "Master Statement of Facts." (Pet. 4 n.3). However, because petitioners' alleged evidence was legally insufficient to show a conspiracy either to allocate customers or to fix prices, let alone to show Amway's participation in either, Amway was not required to "controvert" petitioners' unsupported assertions.

Petitioners also take issue with several of the Eighth Circuit's recitations of the undisputed factual evidence. (Pet. 8 n.10.) In several of these instances, their arguments misstate the Eighth Circuit's opinion. The Eighth Circuit's rejection of petitioners' unsupported characterizations of the record did not amount to fact-finding. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (observing that the appellate court was not obligated to adopt the summary judgment non-movant's view of the facts, when that view was unsupported and "blatantly contradicted by the record. . . .").

> illegal in the, in the tort world, and they don't even crop up in the antitrust world except – here.

Eighth Circuit Oral Arg. 14:52-15:16.[6] Petitioners' price-fixing allegations were similarly unfounded. (App. 16.)

The Eighth Circuit correctly stated that the evidence of record failed to show that Amway joined any unlawful conspiracy. (App. 12-17.) The Court of Appeals properly rejected petitioners' unsupported characterizations of the evidence and the unreasonable inferences petitioners proposed. It affirmed the district court's dismissal of petitioners' antitrust claims on summary judgment.

Following the Eighth Circuit's ruling, petitioners moved for panel rehearing and rehearing en banc. The Eighth Circuit, viewing the arguments presented here as well as others, denied petitioners' request without comment.

REASONS FOR DENYING THE PETITION

The Eighth Circuit's case-specific decision was correct and does not warrant this Court's review.

---

[6] References are to the minute:second of the Eighth Circuit oral argument as set forth in the publicly available audio file on the court's website under "Oral Arguments" at http://www.ca8.uscourts.gov.

Petitioners' claims of an inter- or intra-circuit conflict are illusory and rest upon issues not presented by this case. Moreover, resolution of the questions would not change the result because the Eighth Circuit affirmed for other reasons not addressed by the petition. This case is not a proper vehicle for deciding the questions presented, nor should it further consume this Court's scarce resources. The petition should be denied.

I. THE EIGHTH CIRCUIT CORRECTLY APPLIED THE WELL-SETTLED *MATSUSHITA* STANDARD

A. The Circuits Are Not In Conflict Over The *Matsushita* Standard

1. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) and in its predecessor case, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984), this Court definitively held that conspiracy cases brought under section 1 of the Sherman Act require evidence tending to exclude independent action. This Court announced no exception for direct evidence, although it noted an attempted offering of direct evidence of conspiracy in both cases. *Matsushita*, 475 U.S. at 582-83; *Monsanto,* 465 U.S. at 765. Nor did the Court announce any exception when discussing the *Matsushita* standard in *Bell Atlantic Corp. v. Twombly,* which addressed the pleading requirements for an antitrust case. *See* 550 U.S. 544, 554 (2007).

This Court's holdings are clear: an antitrust claimant must present evidence, either direct, circumstantial, or some combination of both, that tends to exclude the possibility that the antitrust defendants acted independently. *Matsushita*, 475 U.S. at 582-83.[7]

2. The Eighth Circuit correctly applied that standard to the record in this case. (App. 9, 10.)[8] The Court of Appeals ruled consistently with its precedent as well as with the precedent of its sister circuits.

Although the Eighth Circuit has stated that it applies the rule set forth in *Matsushita* broadly, without an exception for cases involving direct evidence, to date it has not encountered a case in which

---

[7] Justices Stevens and Ginsburg noted in *dicta* in their dissent in *Twombly* that the *Matsushita* framework only applied where antitrust claimants relied *entirely* on circumstantial evidence. *See* 550 U.S. at 585-86. That comment is neither the opinion of this Court nor binding precedent, and it also does not conflict with the result suggested by the Eighth Circuit's *dicta* in this case. The Eighth Circuit observed that "direct evidence of an unlawful conspiracy will likely preclude a lawful explanation," and thus likely raise a triable issue on an antitrust claim. (*See* App. 11.)

[8] Petitioners' suggestion, (Pet. 13), that the Eighth Circuit misapplied *Matsushita* by twice failing to recite the word "tending" exalts form over substance. Moreover, the Eighth Circuit also twice quoted the standard, including "tends," verbatim, (App. 9, 10), and it is clear that the Court of Appeals correctly required petitioners to come forward with evidence *tending* to exclude, rather than absolutely excluding, the possibility of independent action.

direct evidence actually was presented. *See, e.g., Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 771 (8th Cir. 2004) (requiring evidence tending to exclude the possibility of independent action and discussing no exceptions); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1032 (8th Cir. 2000).

Appellants mistakenly argue that the Eighth Circuit provided an exception for direct evidence in *Lovett v. Gen. Motors Corp.*, 998 F.2d 575, 578 (8th Cir. 1993). In *Lovett*, there was no direct evidence of conspiracy; thus, there was no occasion to decide whether, on the issue of requiring evidence tending to exclude independent action by the accused, there should be an exception when direct evidence is presented. *Id.*

Other circuits likewise have not recognized any exception for direct evidence. *See, e.g., Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 17-18 (1st Cir. 2004) (must show circumstantial or direct evidence tending to exclude possibility of independent action); *Virgin Atl. Airways Ltd. v. British Airways PLC,* 257 F.3d 256, 263 (2d Cir. 2001) (same). In all but one of the other decisions petitioners cite, (Pet. 9-10), no direct evidence was presented; thus, any statements suggesting an alleged exception for such evidence were *dicta*.

In the sole decision relied on by petitioners that even involved direct evidence, *Champagne Metals v. Ken-Mac Metals, Inc.,* (Pet. 10), the Tenth Circuit

expressly declined to decide whether there should be an exception for direct evidence because neither party presented that issue. *See* 458 F.3d 1073, 1085 (10th Cir. 2006). The most that can be gleaned from *Champagne Metals* is that the issue presented by the petition plainly is not ripe for review by this Court as no conflict exists in the courts of appeals. In all likelihood, any conflict will be a long time coming, should one ever arise. While often argued, truly direct evidence requiring no inferences is rare, as even the cases relied on by petitioners recognize. *See, e.g., Rossi v. Standard Roofing, Inc.,* 156 F.3d 452, 465 (3d Cir. 1998). Conversely, truly direct evidence would likely, but not necessarily, tend to exclude independent action in most cases, as the Eighth Circuit observed here. (App. 11.) In this particular case, however, the question is irrelevant because petitioners did not come forward with direct evidence in the first instance.

The Circuits are not in conflict over the application of the *Matsushita* standard.

B. Petitioners Admitted In The District Court That They Have No Direct Evidence Of Conspiracy; Thus, Their Unpreserved Argument Seeks An Advisory Opinion On A Non-Existent Set Of Facts

This is not a direct evidence case. Petitioners repeatedly told the district court that they lacked

direct evidence of an antitrust conspiracy. They made no direct evidence argument, nor did they even argue against application of *Matsushita*, until they reached the Court of Appeals. *See Rogers v. United States,* 522 U.S. 252, 258-59 (1998) (dismissing certiorari as improvidently granted where legal question was not fairly or clearly presented in the case).

Moreover, petitioners acknowledge, (Pet. 7), that the Eighth Circuit did not hold that they presented direct evidence. As a result, the portion of the Eighth Circuit's opinion they attack is *dictum*. (App. 11.)

In this Court, petitioners retreat again and call their alleged direct evidence "at least strong circumstantial evidence." (Pet. 14.) However, petitioners' alleged evidence is neither direct nor strongly circumstantial.

Direct evidence in a section 1 conspiracy case must be explicit; inferences may not be used to establish the proposition or conclusion asserted. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). When stripped of petitioners' unwarranted assumptions that a *per se* illegal agreement to allocate customers or to fix prices had been shown, it is

clear that petitioners' alleged evidence[9] does not directly show or support an inference that Amway joined a conspiracy to violate the antitrust laws.

The first question presented by petitioners was not properly preserved, seeks nothing more than an advisory opinion, and is not worthy of this Court's time or review. *See Youakim v. Miller,* 425 U.S. 231, 234 (1976) (observing that this Court will not ordinarily decide questions not raised or resolved in the lower courts).

C. Petitioners Did Not Offer Any Evidence Tending To Exclude The Possibility That Amway Acted Independently, As *Matsushita* Required Them To Do

1. Although petitioners accuse the Eighth Circuit of misunderstanding the nature of "independent action," (Pet. 13-15), the reality is that the court

---

[9] The evidence petitioners cite selectively at this late stage consists of a suggestion by Billy Zeoli, who was involved at the request of Pro Net principals, that Pro Net and InterNET refrain from soliciting one another's customers, as well as vague opinion testimony from two witnesses attempting to characterize Amway's alleged participation. (Pet. 14.) The suggestion by Zeoli "neither suggested nor precipitated unlawful activity attributable to Amway." (App. 14-15 and n.4.) At oral argument before the district court, petitioners conceded that Zeoli was an independent consultant. (App. 41.) Petitioners' ambiguous opinion testimony regarding Amway's alleged involvement does not tend to rule out that Amway was acting independently to protect its products business.

understood exactly what is required by that term and further understood that petitioners failed to offer any evidence tending to exclude the possibility that Amway acted independently, which they were required to do under *Matsushita*. *See* 475 U.S. at 588. This conclusion alone warranted affirmance.

2. The Eighth Circuit did not affirm merely because the evidence showed that Amway acted out of a desire to protect its products business. (*See* App. 12-13.) Rather, it affirmed because it recognized that Amway's purpose and actions were legally proper and insufficient to support an inference that Amway consciously committed to an illegal scheme with Pro Net and InterNET. *Id.*[10]

The Eighth Circuit correctly applied the well-settled *Matsushita* standard in this case.

II. THE EIGHTH CIRCUIT CORRECTLY RULED THAT AMWAY DOES NOT COMPETE AT THE SAME LEVEL OF THE MARKET AS InterNET AND PRO NET

1. The undisputed evidence is that Amway is not at the same level of the market as InterNET and Pro Net. The Eighth Circuit correctly ruled that Amway acted not as a horizontal competitor, but as a

---

[10] Petitioners also fault the Eighth Circuit for not discussing their allegation that Amway sought to sell BSMs through Pro Net (Pet 3, 7), but petitioners offered no evidence to support their allegation.

vertical quasi-parent company. (App. 12-14.) Thus, Amway was incapable of combining with InterNET and Pro Net to impose a *per se* illegal restraint of trade. *See ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 556 (8th Cir. 1991) (observing that a section 1 violation "is a combination, conspiracy or agreement between competitors *at the same level of the market* to restrain competition; the so-called 'horizontal restraint of trade.'") (emphasis added). *See also United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972) (same).

Petitioners conceded in the Court of Appeals that the Amway products business and the petitioners' BSM businesses are vertical:

> The Court: Is this one vertical product line with an ancillary support enterprise, industry if you will?
>
> Mr. Boulware: They are two side by side, and it is vertical, it is vertical.

Eighth Cir. Oral Arg. 1:58-2:15; *see also id.* at 17:53-19:03; *id.* at 3:45 (admitting that "Amway didn't have a market"); Dkt. No. 242, Ex. F to Petitioners' 1st Amend. Compl. (positioning Amway vertically above InterNet and Pro Net). Even petitioners' statement that Amway "has positioned itself as the gatekeeper of BSMs," (Pet. 18), is a concession that Amway's position was vertical, as a quasi-parent company, and supports the Court of Appeals' holding. *See Rogers*, 522 U.S. at 258-59.

2. The fact that Amway may have produced motivational materials for some limited use does not mean that Amway competes at the same level of the market as InterNET and Pro Net. Nor does the Antitrust Primer say that Amway competes at the same level of the market as InterNET and Pro Net, as petitioners suggest. (*See* Pet. 17 n.14.)[11]

3. As petitioners note, (Pet. 18), Amway has Rules about the types of representations that may be made about Amway's products business in motivational materials. Amway enforces these Rules among its products distributors, but this fact is inconsequential because petitioners are not products distributors. Indeed, in an earlier phase of this litigation, petitioners successfully argued that these Rules do not apply to them because they are *not* products distributors. (*See, e.g.*, App. 72.) They may not argue otherwise now.

---

[11] Petitioners' argument in footnote 15 is equally unavailing. (Pet. 17 n.15.) The undated document that petitioners appear to be referencing was not mentioned in their briefs or in their arguments to the Eighth Circuit. They did not provide the document to the Eighth Circuit at all, but instead merely offered their slanted mischaracterization of it in two sentences buried in their Master Statement of Facts that was a small part of seven volumes of appendix materials. Somehow, petitioners expected the Court of Appeals to locate, and then blindly accept, their unsubstantiated argument. Equally telling, however, is that even petitioners' characterization of the document to this Court, (Pet. 17 n.15), supports the Eighth Circuit's conclusion that Amway's relationship with BSM businesses, including InterNET and Pro Net, was vertical.

Moreover, Amway has a lawful right to impose vertical restrictions upon how its products distributors represent Amway in motivational materials. (*See* App. 15-16 (observing that the FTC "concluded that the line of sponsorship system [through which Amway's Rules are enforced upon products distributors] is vertically imposed and is 'reasonably ancillary to compensation, efficient distribution, and training.'").)

The Eighth Circuit correctly concluded, based on the undisputed evidence of record, that Amway does not compete at the same level of the market as InterNET and Pro Net. This case-specific conclusion did not create a *de minimis* exception to *per se* antitrust liability and does not require this Court's review.

III. THE COURT OF APPEALS ALSO AFFIRMED ON GROUNDS PETITIONERS DO NOT CHALLENGE HERE, AND THUS THIS COURT'S DISPOSITION OF THE QUESTIONS PRESENTED WOULD NOT ALTER THE RESULT BELOW

The Eighth Circuit also affirmed for reasons having nothing to do with whether Amway was involved in any alleged conspiracy. The Court of Appeals determined that petitioners had not raised a triable issue regarding the existence of a *per se* illegal

agreement to allocate customers or to fix prices.[12] (App. 14 ("Although appellants have shown that Amway was involved in the breakaway, there is no evidence that the breakaway itself was unlawful.").) It also affirmed the district court's conclusion that the antitrust claims of Netco and Schmitz & Associates were time-barred. (App. 18-19.)

The petition does not address these independent bases for the affirmance by the Court of Appeals. This case is not an appropriate vehicle to resolve petitioners' issues because the Eighth Circuit's ruling will stand affirmed on these alternative grounds regardless of this Court's disposition of petitioners' questions presented.

---

[12] Petitioners incorrectly suggest that the Eighth Circuit held on its own initiative that they had not produced any evidence to support an inference of *per se* illegality for an alleged agreement between InterNET and Pro Net to refrain from soliciting each other's customers. (Pet. 8.) The Court of Appeals merely addressed an argument that Amway explicitly raised in its Response Brief at page 27. As Amway urged, any alleged agreement between InterNET and Pro Net would not have changed the status quo in the BSMs market because Pro Net and InterNET's principals were already obligated, as vertically integrated distributors of Amway products, to refrain from soliciting each other's customers. (App. 15-16.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES R. SOBIERAJ
Counsel of Record
CYNTHIA A. HOMAN
RALPH J. GABRIC
JULIE L. LEICHTMAN
BRINKS HOFER GILSON & LIONE
NBC Tower – Suite 3600
455 North Cityfront Plaza Drive
Chicago, Illinois 60611
(312) 321-4200